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SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

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8 Attorneys for Designated Party
BAE Systems San Diego Ship Repair, Inc.

9 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

10
11 SAN DIEGO REGION

12 IN RE TENTATIVE CLEANUP AND
13 ABATEMENT ORDER NO. R9-2011-
0001 (formerly No. R9-2010-0002)

**BAE SYSTEMS SAN DIEGO SHIP
REPAIR, INC.'S MOTION TO EXCLUDE
DECLARATIONS OF THE PORT
DISTRICT'S EXPERTS MICHAEL
JOHNS, PH.D., YING POON, D.SC., AND
ROBERT COLLACOTT, MBA, M.S.**

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18 Presiding Officer: Grant Destache

1 Designated Party BAE Systems San Diego Ship Repair, Inc. (“BAE Systems”) hereby
2 objects to the San Diego Unified Port District’s (“Port District”) inclusion of untimely expert
3 reports by Michael Johns, Ph.D., (Ex. 3 to the Port District’s comments), Ying Poon, D.Sc., (Ex.
4 4 to the Port District’s comments), and Robert Collacott, MBA, M.S. (Ex. 20 to the Port District’s
5 comments) in its comments concerning the Tentative Cleanup and Abatement Order No. R9-
6 2011-0001 and supporting Draft Technical Report. Because the Port District unreasonably failed
7 to submit reports for these experts by March 11, 2011, in violation of the California Regional
8 Water Quality Control Board, San Diego Region’s (“Regional Board”) orders governing
9 discovery for these proceedings, BAE Systems hereby moves to exclude them, and further
10 requests that the Regional Board disregard the portions of the Port District’s May 26, 2011
11 comments that refer to and rely upon these improperly-submitted expert opinions.

12 **I. INTRODUCTION AND FACTUAL BACKGROUND**

13 On September 15, 2010, the San Diego Water Board Cleanup Team released a revised
14 Tentative Cleanup and Abatement Order No. R9-2011-0001 (“TCAO”) and supporting Draft
15 Technical Report (“DTR”). On October 19, 2010, the Port District filed a Motion to Reopen and
16 Extend Discovery Deadlines in these proceedings. On October 27, 2010, the Regional Board
17 issued an order reopening discovery and extending the discovery schedule previously adopted by
18 the Regional Board. This order, attached hereto as Exhibit A, expressly states that parties must
19 submit their expert reports no later than March 11, 2011. Despite this clear deadline, the Port
20 District allowed the March 11, 2011 deadline to pass without submitting reports for any of its
21 designated experts. BAE Systems, on the other hand, submitted reports for three of its experts by
22 the March 11, 2011 deadline.

23 Rather than seek relief from the Regional Board for its failure to timely submit its expert
24 reports, the Port District instead has attempted to rectify its error by surreptitiously inserting, by
25 way of declaration, the opinions¹ of its experts into its May 26, 2011 comments to the Regional
26 Board regarding the TCAO and supporting DTR. The Port District’s inclusion of evidence

27 ¹ Each Port District expert expressly offers expert opinions in their respective declarations. *See, e.g.*, Johns
28 Declaration (Ex. 3), at ¶ 4 (“It is my opinion . . .”); Poon Declaration (Ex. 5), at ¶ 13 (based on his modeling results,
“the Exponent Report overestimates...”; Collacott Declaration (Ex. 20), at ¶ 7 (“In my opinion . . .”).

1 containing the opinions of these experts in its comments is improper given that the deadline to
2 submit expert reports provided all Designated Parties, including the Port District, with more than
3 six months to conduct the discovery necessary to address the revisions contained in the
4 September 2010 TCAO. For this, and other reasons set forth more fully below, the Regional
5 Board should exclude the untimely expert opinions.

6 **II. CALIFORNIA CODE OF CIVIL PROCEDURE GOVERNS EXPERT ISSUES**

7 The Final Discovery Plan issued by the Presiding Officer, dated February 18, 2010,
8 specifically incorporates the California Code of Civil Procedure, except as modified in that order,
9 for purposes of governing discovery in this matter, including expert discovery. (2/18/10 Final
10 Discovery Plan, at § I.) The Final Discovery Plan does not modify the Code with respect to
11 experts. It does, however, affirm that “submission of expert evidence must adhere to discovery
12 schedule to preserve all parties’ procedural and due process rights.” (*Id.* at II-B-1.)

13 The current Presiding Officer’s October 27, 2010 Order “reopens and extends the
14 discovery schedule previously adopted by Order dated February 18, 2010, with all discovery to be
15 completed on or before March 11, 2011.” (10/27/10 Order Reopening Discovery Period, § I.)
16 Specifically, that Order provides that March 11, 2011 is the “last day to submit expert reports.”
17 (*Id.*, § IV.)

18 Thus, the California Code of Civil Procedure (section 2034.010 *et seq.*) governs expert
19 discovery issues in this proceeding, including resolution of the instant motion to exclude the Port
20 District’s untimely expert opinions.

21 **III. LEGAL STANDARD**

22 Upon demand, all parties are required to exchange written information about their expert
23 witnesses, including reports and writings made by the expert witnesses in the course of preparing
24 their opinions. Cal. Civ. Proc. Code § 2034.210(c). As courts have noted, the need for pretrial
25 discovery is greater with respect to expert witnesses than ordinary fact witnesses because the
26 opponent must prepare to cope with the expert’s specialized knowledge. *Boston v. Penny Lane*
27 *Centers, Inc.*, 170 Cal. App. 4th 936, 951 (2009). In particular, the expert pretrial discovery
28 provisions allow “the parties to assess whether to take the expert’s deposition, to fully explore the

1 relevant subject area at any such deposition, and to select an expert who can respond with a
2 competing opinion on that subject area.” *Bonds v. Roy*, 20 Cal. 4th 140, 147 (1999).

3 Section 2034.250(b)(3) of the California Code of Civil Procedure gives the Regional
4 Board discretion to order that this exchange of information be made only on specified terms and
5 conditions.

6 With respect to a party’s non-compliance with the Code’s expert provisions, Section
7 2034.300(c) unequivocally states:

8 “on objection of any party who has made a complete and timely
9 compliance with Section 2034.260, the trial court shall exclude
10 from evidence the expert opinion of any witness that is offered by a
party who has unreasonably failed to” produce reports and writings
of expert witnesses.

11 Thus, if a party unreasonably fails to produce the report of its expert witness, the Regional
12 Board must exclude the expert witness’s opinion. Cal. Civ. Proc. Code § 2034.300(c). A party’s
13 failure to produce the report of one of its expert witnesses is considered unreasonable if the delay
14 is intentional or the result of gamesmanship. *Zellerino v. Brown*, 235 Cal. App. 3d 1097, 1116-17
15 (1991); *Boston*, 170 Cal. App. 4th at 952. In addition to the conduct of the party offering the
16 expert, “[t]he behavior of the party seeking to exclude the expert testimony is relevant to the
17 reasonableness inquiry.” *Boston*, 170 Cal. App. 4th at 954.

18 **IV. ANALYSIS**

19 On January 18, 2011, the Port District designated Dr. Johns, Dr. Poon, and Mr. Collacott
20 as expert witnesses pursuant to the Regional Board’s October 27, 2010 order. Despite having
21 more than four months thereafter to provide expert reports for these experts (and being on notice
22 of the revisions to the TCAO and DTR for more than six months), however, the Port District did
23 not provide any reports for these expert witnesses by the March 11, 2011 deadline. Yet two and a
24 half months later, on May 26, 2011, in connection with its comments regarding the TCAO and
25 supporting DTR, the Port District included declarations from these experts in which the experts
26 offered opinions on a number of issues related to the findings set forth by the Regional Board in
27 the TCAO and supporting DTR. The Port District’s inclusion of these opinions is untimely,
28 impermissible, and unreasonable for a number of reasons.

1 First, the Port District had been aware of the revisions to the TCAO and DTR since
2 September 2010, giving its experts more than enough time to prepare reports addressing the
3 issues important to the Port District. As is readily apparent from the experts' declarations, all
4 three experts reviewed and relied on materials that were available no later than September 2010.
5 There is simply no reasonable explanation for why the Port District could not submit the reports
6 for these experts to all Designated Parties by the Regional Board-ordered deadline.

7 Second, for more than five months, the Port District had been aware of its obligation to
8 produce reports for any designated experts by March 11, 2011. Importantly, it was at the Port
9 District's urging that the Regional Board reopened discovery and extended the discovery
10 deadlines, including the deadline for submission of expert reports. The Port District cannot
11 complain that it did not have ample time to meet its Regional Board-ordered discovery
12 obligations.

13 Third, even after the deadline passed (and the Port District received expert reports from
14 other Designated Parties, including BAE Systems), the Port District failed to seek relief from its
15 error for more than two months. In fact, the Port District still fails to seek relief from its error,
16 instead opting to simply include declarations for its experts in the comments regarding the TCAO
17 and DTR it has submitted to the Regional Board without addressing the lateness of those
18 opinions. The Port District's failure to seek relief for failing to provide the Designated Parties
19 with the reports of its experts is clearly an attempt to thwart BAE Systems' and the other
20 Designated Parties' efforts to challenge those opinions. *See, e.g., Zellerino*, 135 Cal. App. 3d at
21 1116-17.

22 Fourth, the Port District's untimely submission is prejudicial to BAE Systems, which has
23 complied with the deadlines set forth in the Regional Board's October 27, 2010 order, including
24 those related to expert witnesses. By waiting and not submitting, the Port District's experts had
25 the benefit of reviewing and analyzing other parties' submissions, and were then able to formulate
26 their expert opinions with that benefit. The other parties, including BAE Systems, did not have
27 this benefit, and thus have been prejudiced by the Port District's improper tactics.

1 Finally, BAE Systems has promptly moved to exclude the declarations of these experts,
2 which were first disclosed when the Port District submitted its comments regarding the TCAO
3 and DTR on May 26, 2011. The fact that BAE Systems has not delayed in moving for exclusion
4 weighs in favor of exclusion. See *Stanchfield v. Hamer Toyota, Inc.*, 37 Cal. App. 4th 1495, 1503
5 (1995) (finding that party's delay in seeking relief makes it less likely that the conduct of the
6 party offering the expert is unreasonable).

7 Based on the foregoing, the Port District's failure to provide the reports for its experts is
8 unreasonable, and therefore the instant expert declarations containing those expert opinions
9 should be excluded from consideration by the Regional Board.

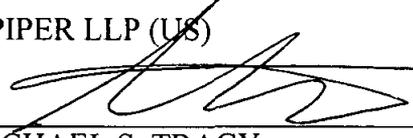
10 **V. CONCLUSION**

11 For the foregoing reasons, BAE Systems respectfully requests that the Regional Board
12 exclude the declarations of Michael Johns, Ph.D., Ying Poon, D.Sc., and Robert Collacott, MBA,
13 M.S. from consideration, and disregard the portions of the Port District's May 26, 2011
14 comments that refer to and rely upon these improperly-submitted expert opinions.

15 Dated: June 23, 2011

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By



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